Supreme Court, U.S.
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No. 91-1897

In The

Supreme Court of the United States

October Term, 1992

MARVIN D. CUTRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE UNITED STATES COURT REPORTERS ASSOCIATION IN SUPPORT OF PETITIONER MARVIN D. CUTRIGHT

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QUESTIONS PRESENTED

1. Whether appointed federal court reporters are full-time employees of the government who are entitled to benefits under the Annual and Sick Leave Act, 5 U.S.C. § 6301.

2. Whether the deprivation of vested annual and sick leave benefits constitutes an improper taking of property in violation of the due process clause of the Constitution of the United States when those benefits are deprived by a government agency's administrative fiat which is contrary to a clear and unambiguous statute of the United States Congress.

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Marvin D. Cutright, an individual; and

2. The United States of America.

The United States Court Reporters Association ("USCRA") submits this Brief *Amicus Curiae* in support of the Petition of Marvin D. Cutright. All parties in this matter have consented to the filing of this Brief as required by Supreme Court Rule 37.2. Those consents accompany this Brief.

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The United States Court Reporters Association ("USCRA") respectfully prays, in support of Marvin D. Cutright, that a writ of certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on January 14, 1992 (Rehearing denied on March 5, 1992).

INTEREST OF THE AMICUS CURIAE

The United States Court Reporters Association ("USCRA") was formed in 1945 and has been committed since that time to serving and representing the interests of federal reporters throughout the United States appointed under 28 U.S.C. § 753. The USCRA is governed by a Board of Directors composed of one federal reporter from each circuit. There are approximately 650 federal reporters serving the federal courts in this country.

The United States Court of Appeals for the Federal Circuit held on January 14, 1992, that Marvin D. Cutright, a retired federal court reporter and Petitioner herein, was a "part-time" employee who was excluded from Leave Act coverage prior to 1984 because he was not assigned a "regular tour of duty during the administrative work week."[1] (*See* Appendix A of Marvin D. Cutright's Petition for Writ of Certiorari). Since this ruling will affect many of its members, the USCRA files this brief in support of Petitioner.

[1] In January, 1984, court reporters were given a "regular tour of duty" as part of their assignments, purportedly in an attempt to justify the government's argument that court reporters have always been "part-time" employees.

In so ruling, the United States Court of Appeals for the Federal Circuit changed a long-standing presumption that Leave Act benefits are to be afforded to all federal workers absent a specific statutory exception. The lower court allowed the Administrative Office of the United States Courts, by agency fiat, to unilaterally redefine the terms and conditions of the Leave Act to exclude an entire class of federal employees from coverage without a Congressional mandate to permit the exclusion.

The lower court's holding also deprives Petitioner, and potentially other federal court reporters, of vested property rights in violation of the Constitution of the United States.

This Brief of *Amicus Curiae* is respectfully submitted in support of Marvin D. Cutright's Petition for Writ of Certiorari. USCRA believes that this Honorable Court should remedy the clear injustice done to Mr. Cutright and should reverse a ruling that casts doubt on the applicability of the Leave Act to all federal reporters by improperly classifying them as "part-time" employees despite their employment records as appointed full-time, salaried federal employees.

SUMMARY OF ARGUMENT

Leave Act benefits are afforded to the vast majority of federal workers. Only those expressly excluded by statute are not entitled to receive benefits. Court reporters are not among any of the specifically-enumerated exceptions to Leave Act coverage. 5 U.S.C. § 6301(2)(i)-(xiii).

The United States' position is clearly erroneous and overreaching. Most, if not all federal reporters, including Marvin D. Cutright, should be recognized as full-time employees both prior to January, 1984, and subsequently. There is no need to give federal reporters a "regular tour of duty" in order to make them eligible for Leave Act benefits. Such a reclassification was, and is, a sham to avoid paying full-time reporters their entitlements under the Leave Act. The government has admitted that court reporters should be recognized as having full-time status and has implicitly and expressly recognized the full-time nature of a court reporter's appointment by virtue of its past conduct.

Failure to acknowledge a federal reporter's rights to vested Leave Act benefits constitutes an unwarranted and unconstitutional deprivation of property without due process of law since those rights are mandated by Congress and are a part of the important benefits court reporters have an interest in receiving.

ARGUMENT

I. APPOINTED FEDERAL COURT REPORTERS ARE EMPLOYEES WITHIN THE MEANING OF THE ANNUAL AND SICK LEAVE ACT.

The government contends that Marvin D. Cutright and, by implication, other federal reporters are excluded from coverage under the Leave Act because they were not placed on a "regular tour of duty" prior to 1984 as required by § 6301(2)(B)(ii) of the Leave Act, 5 U.S.C. § 6301(2). The "regular tour of duty" exception applies

only to part-time employees, according to the explicit language of § 6301. Therefore, if an employee works full-time for the government, the "regular tour of duty" exception does not apply.

The vast majority of appointed[2] federal court reporters are full-time employees of the government. The Court Reporter's Act, 28 U.S.C. § 753, which authorizes the appointment and use of official court reporters by district courts, gives absolutely no indication that appointed court reporters are to be treated as part-time employees. On the contrary, a fair reading of the Court Reporter's Act supports the full-time nature of their appointments. For example, the Act itself distinguishes between reporters "appointed" by a district court and reporters who are hired for "temporary service." 28 U.S.C. § 753(a). Furthermore, the Court Reporter's Act mandates that each appointed reporter "shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States." 28 U.S.C. § 753(e). As indicated, *infra*, this annual salary reflects 40 hours of work per week – a full-time schedule. Additionally, subsection (g) of the Court Reporter's Act provides for employment of reporters on a contract basis (rather than appointment) in certain situations. 28 U.S.C. § 753(g). Again, this supports the distinction between full-time appointed reporters and those employed on a temporary or part-time basis.

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[2] It has been held that appointment to federal service is *sine qua non* evidence of employment status. *See Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986); *Goutos v. United States*, 212 Ct. Cl. 95, 552 F.2d 922 (Ct. Cl. 1976).

The courts have also drawn a clear distinction between full-time reporters, *i.e.* those appointed pursuant to the Court Reporter's Act, and "contract" or part-time reporters. In *Goldhaber v. Foley*, 519 F. Supp. 466 (E.D. Pa. 1981), a bankruptcy judge and two court reporters serving the bankruptcy court brought an action seeking to enjoin the Administrative Office of the United States Courts from putting into effect a court reporting contract with reporters hired on a part-time basis to replace the "full-time salaried employees." While the court concluded that, in the bankruptcy context, full-time reporters could be replaced with part-time "contract" reporters by the Administrative Office, it made a *clear* distinction between "full-time salaried" reporters appointed by the court and part-time "contract" reporters hired by the Administrative Office. In allowing the "full-time" reporters to be replaced by "contract" reporters, the court saw a difference between reporters appointed pursuant to the Bankruptcy Reform Act, *see* 28 U.S.C. § 773(a), and the Court Reporter's Act. In the court's opinion, the Bankruptcy Reform Act is permissive with respect to the appointment of full-time reporters, whereas the Court Reporter's Act is mandatory in the sense that it requires the appointment of *at least* one full-time salaried reporter for each district court. 519 F. Supp. at 477. The Federal Circuit's opinion below, however, denies the existence of such full-time salaried reporters.

Thus, even the courts have recognized the full-time status of appointed, salaried court reporters. Indeed, the Administrative Office of the United States Courts, the agency involved in the present case, implicitly acknowledged this distinction by seeking to replace salaried

employees with part-time employees in bankruptcy courts in *Goldhaber*.

As set forth at length in Marvin D. Cutright's Petition, the Leave Act is very explicit in setting forth categories of federal employees which are not to be included in the Leave Act. 5 U.S.C. § 6301(2). Indeed, Congress goes to great length to specifically exclude different types of employees (*e.g.*, teacher, librarian, physician). Official court reporters are not explicitly excluded from coverage. Even though Congress had ample opportunity to exclude court reporters from Leave Act coverage when it amended it in 1978, it failed to do so.[3] If Congress had intended to exclude court reporters from Leave Act coverage, it had the ability and opportunity to do so in 1978. Its failure to create a specific exclusion is strong evidence supporting coverage of federal court reporters.

As pointed out in Marvin D. Cutright's Petition, it appears that the United States has long recognized the clarity of the Leave Act statute. (*See* Appendices E-H of Marvin D. Cutright's Petition). Statements such as "it is clear in our view that this procedure [of excluding court staff from Leave Act coverage] is improper under the law (Appendix F of Petition, pp. 52a-53a)" and that the Leave

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[3] Clause (XII) to subsection (2)(B), excluding "any officer of the legislative or judicial branch who is appointed by the President" from Leave Act coverage. The express congressional purpose of the amendment was to "clarify existing law by specifically excepting all presidentially appointed officers in the legislative and judicial branches from the annual and sick leave provisions" of the Act. *Legislative History of P.L. 95-519*, 92 Stat. 4160. Congress also noted that the Annual and Sick Leave Act applies "to the vast majority of federal employees." *Id.*

Act "clearly places all employees of the judicial branch under the provisions of the law except for judges appointed by the President" (Appendix G to the Petition, p. 61a) clearly demonstrate the government's knowledge of the administrative error involved in failing to include court reporters and other full-time employees in the Leave Act system prior to 1984. Thus the United States, while publicly contending that there was a "clear" exclusion of federal court reporters as "part-time employees," secretly acknowledged in internal correspondence and legal memoranda that employees such as court reporters should have been included in the leave system, and that their exclusion was erroneous.

The United States' conduct supports the position that Marvin D. Cutright and other federal reporters were full-time employees prior to 1984. For example, earning statements issued by the Administrative Office clearly indicate that appointed reporters were considered full-time employees. As exemplified in the earnings statements submitted with Mr. Cutright's Petition (Appendix J, pp. 75a-83a), Mr. Cutright and other appointed reporters were paid an annual salary (as required by the Court Reporter's Act) which was reflected on the statements. The statements further reflect payment for two full work weeks (totalling 80 hours), another tacit admission of a reporter's full-time status.

Furthermore, the *Guide to Judiciary Policies and Procedures: Court Reporter's Manual,* published by the Administrative Office, states that all official court reporters who have completed ten years of *full-time* service as a court reporter for a United States District Court shall receive a longevity increase in pay. *Court Reporter's Manual,* Vol. VI,

Ch. 5 (*see* Appendix B to Marvin D. Cutright's Petition, p. 22a). This constitutes a further tacit recognition by the government that court reporters should be treated as full-time employees. In fact, Marvin D. Cutright and most other court reporters who the government contends were "part-time" reporters, received and are receiving longevity increases based on the above provision. (*See* Appendix J to Marvin D. Cutright's Petition, p. 73a).

While this Honorable Court has not addressed the issue of administrative attempts to circumvent the statutory language of the Leave Act, the lower courts have found such attempts to be improper. For example, in *Cain v. United States*, 77 F. Supp. 505 (N.D. Ill. 1948),[4] the court rejected the Comptroller General's report that secretaries and law clerks were part-time employees. The District Court held that the language of the Leave Act is plain, clear and unequivocal, and does not specifically exclude judicial secretaries or law clerks. It noted that "Congress . . . should make the exception, not the Comptroller General or the courts." 77 F. Supp. at 508. *See also, Sauer v. United States*, 173 Ct. Cl. 642, 354 F.2d 302 (Ct. Cl. 1965) (an auditor of the Court of Claims was entitled to lump sum distribution for accumulated leave upon retirement).

In the present case, the United States is unable to point to any specific exception excluding federal court reporters from Leave Act coverage. Instead, in an attempt to circumvent congressional intent and general rules of

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[4] In an effort to avoid repetition, USCRA refers the Court to the more complete analysis of *Cain* set forth in Marvin D. Cutright's Petition.

statutory construction, the government attempts to "pigeon hole" court reporters into an exception to the definition of employee which, it is respectfully submitted, has no applicability whatsoever to court reporters.

Despite the overwhelming evidence to the contrary, the United States and the lower court concluded that appointed federal court reporters are part-time employees solely because they are able to augment their incomes by receiving compensation from private sources. First, the government fails to explain how the ability to receive compensation from private sources translates into an exclusion under the Leave Act. "Freelancing" is not barred by statute or regulation. Federal court reporters fall squarely within the Leave Act definition of "employee," and unless Congress sees fit to amend the Act to make a specific exclusion, any employee falling with in the parameters of that definition is entitled to Leave Act benefits.

Additionally, the Court Reporter's Act, 28 U.S.C. § 753, specifically authorizes the collection of fees for transcripts requested by the parties, "at rates prescribed by the court subject to the approval of the Judicial Conference." 28 U.S.C. § 753(f). Thus, Congress envisioned the ability of court reporters to collect private compensation over and above the salary paid by the United States, and in fact regulated the amount of that compensation via the supervision of the courts and the Judicial Conference. Yet Congress did not see fit to specifically designate court reporters as part-time employees or to expressly exclude reporters from the broad coverage of the Leave Act. While the United States will seek to have the Court take

"judicial notice" of the "fact" that court reporters "freelance," there is absolutely nothing in the record before this Court to confirm this "fact," let alone any evidence that any "freelancing" impinges on their duties to the district courts.

In any event, it is respectfully submitted that any such "freelancing" is irrelevant to the issues before this Court. By virtue of their employment with the federal government and their receipt of a full-time salary, court reporters are obligated to perform services for the government, and indeed perform vital full-time services for the government. *See Goldhaber v. Foley*, 519 F. Supp. 466, 482 (E.D. Pa. 1981) ("The court is well aware of the value of a court reporter who is not only competent but also loyal and accountable to the court."). This does not mean, however, that a reporter's "free time" should be restricted or that the productive use of that "free time" should enable the government to circumvent the clear entitlement to Leave Act benefits.

II. THE REFUSAL TO CREDIT APPOINTED FULL-TIME FEDERAL COURT REPORTERS WITH LEAVE ACT BENEFITS IS A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Despite the Administrative Office's insistence to the contrary, Congress, the courts and, indeed, the Administrative Office (by way of admissions set forth above) clearly intended federal court reporters to fall within the broad definition of "employee" as defined by 5 U.S.C. §§ 2105 and 6301. Furthermore, Congress intended to

create an entitlement or property right to Leave Act benefits for all eligible employees. *See* 5 U.S.C. §§ 6303(a) and 6307.

Of course, it is fundamental that a person who has a property right cannot be deprived of that right without due process of law. *U. S. Const.*, Amend. V; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972).

Yet that is precisely what the government agency involved here is attempting to do by unilaterally refusing to make payment of statutory benefits to their loyal full-time employees.

CONCLUSION

For the reasons set forth above, the United States Court Reporter's Association, as *amicus curiae*, respectfully requests this Honorable Court to grant Marvin D. Cutright's Petition for Writ of Certiorari to permit a resolution of important issues affecting not only Mr. Cutright, but all federal court reporters whose benefits have been or will be deprived by a government agency's improper denial of statutory, constitutional, and contractual rights.

Respectfully submitted,

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